BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY D. JONES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,059,137
GENERAL MOTORS CORPORATION	)	
Self-Insured Respondent	)	

ORDER

Respondent requests review of the May 22, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

APPEARANCES

Zachary A. Kolich, of Shawnee Mission, Kansas, appeared for the claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing dated February 21, 2012; the transcript of Preliminary Hearing dated April 2, 2013; the transcript of Preliminary Hearing dated September 17, 2013, with exhibits; Evidentiary Deposition of Lowry Jones, Jr., M.D., dated December 10, 2013, with exhibits; the transcript of Preliminary Hearing dated May 20, 2014, and the documents of record filed with the Division.

ISSUES

The ALJ denied respondent's request to terminate the authorization of Dr. Jones and ordered respondent to pay costs of medical treatment and cost of court reporter fees for the preliminary hearing. The ALJ based his decision on Dr. Jones' opinion that additional treatment, including a total knee replacement, is primarily due to claimant's occupational injury with respondent.

Respondent requests review of whether the current need for medical treatment, and specifically a total knee replacement, stems from the work-related accident suffered by

claimant which arose out of and in the course of his employment; and whether the ALJ exceeded his authority and/or jurisdiction in denying respondent's request to terminate benefits. Respondent argues claimant failed to carry his burden of proving the prevailing factor in causing claimant's need for treatment, specifically the total knee replacement, was caused by the accident which arose out of and in the course of his employment. Therefore, respondent contends the ALJ's Order should be reversed.

Claimant argues the request for review should be denied for failure to present a jurisdictional issue that is reviewable from the preliminary hearing order. In the alternative, should the Board feel respondent's request is jurisdictional, the ALJ's Order should be affirmed.

FINDINGS OF FACT

Respondent admitted compensability at the September 17, 2013, preliminary hearing, but questioned whether claimant's current need for a total knee replacement is related to the occupational accident on November 28, 2011.

Claimant, a 27-year employee of respondent, suffered injury on November 28, 2011, while working for respondent. Claimant was injured in the tire room at the Fairfax plant when a tire hit him in his right knee. Claimant was sent to plant medical and was provided treatment. Claimant was referred by respondent to Dr. Prem Parmar, who performed surgery involving an arthroscopic partial lateral meniscectomy with debridement of the anterior and lateral compartments.

Claimant indicated that, despite all of the treatment he received, his knee got worse. He was referred by Dr. Parmar to Robert C. Gardiner, M.D., on July 13, 2012, for an examination and second opinion regarding his right knee injury. Dr. Gardiner opined claimant had osteoarthritis of the right knee and right knee pain. Claimant was found to have preexisting arthritis with a work-related injury exacerbating the symptoms. Dr. Gardiner determined claimant needed a total knee replacement.

Claimant's attorney sent him to Edward Prostic, M.D., for an examination on October 12, 2012. Claimant reported difficulty with his right knee, predominately anterior discomfort. He had difficulty walking, standing and with stairs. Claimant was unable to squat, kneel, run, jump or dance. He had swelling, clicking and popping. Dr. Prostic reported the only way claimant's knee would be improved is with a total knee replacement. He opined claimant would not be able to return to work until he has a satisfactory response to surgery. Dr. Prostic found claimant's November 28, 2011, accident to be the prevailing factor in causing the injury, medical conditions and the need for medical treatment.

Claimant admits to having problems with his right knee 20 years ago, where he slipped on some water and hyperextended his knee. He received physical therapy for this injury. He had no problems with his right knee when he returned to full duty from that

injury. Claimant indicated that before the November 28, 2011, accident he was never told he had arthritis in his right knee. Claimant testified his right knee was 100 percent before the tire accident on November 28, 2011. Since the November 28, 2011, accident, claimant has had pain in the center and right side of his right knee.

Claimant met with orthopedic surgeon Lowry Jones, Jr., M.D., on July 31, 2013, for a court-appointed Independent Medical Evaluation (IME). Claimant's chief complaint at the time was right knee pain. Dr. Jones was asked by the court to determine whether claimant needs a total right knee replacement, and to identify any and all factors contributing to the need for knee replacement. Dr. Jones reviewed the earlier MRI performed on claimant's right knee, which showed lateral joint line arthritic disease, grade 4, a lateral meniscal tear and patellofemoral changes. He opined the lateral meniscal tear was probably an old condition. He stated that it is more probable that there was a tear originally and the work injury may have made the tear worse. The patellofemoral joint was, very likely, directly related to claimant's injury. The grade 4 chondromalacia of the lateral tibial plateau was a preexisting condition.

Dr. Jones opined claimant sustained an injury to the anterior lateral aspect of the knee and this aggravated or significantly accelerated the need for additional medical and/or surgical treatment. Because claimant had ongoing pain after the surgery, Dr. Jones opined the injury was the prevailing cause for claimant's need for additional treatment including a total knee replacement. He recommended additional follow up and cortisone injections or a hyaluronic acid injection, but felt a total knee replacement is likely necessary. Dr. Jones testified that if not for the preexisting, degenerative problems in claimant's knee, claimant would not need the recommended knee replacement. He did not feel claimant was at maximum medical improvement. He recommended restrictions of limited kneeling, squatting, and climbing.

Dr. Jones testified that if claimant had come in with pain before the accident and had x-rays and an MRI, where degenerative changes were found, he would not have recommended a total knee replacement. Instead, he would have recommended injections. He also indicated that many people live with arthritis and never have any symptoms. It is Dr. Jones' opinion that claimant sustained a lesion or a change to the physical structure of his right knee when the tire struck his knee on November 28, 2011.

Dr. Jones noted that when claimant met with Dr. Parmar upon referral, it was documented claimant had arthritic changes of the lateral joint line, a lateral meniscal tear and a grade 2 to grade 3 chondral injury of the patelleofemoral joint. An MRI showed lateral joint line arthritic disease, grade 4 disease, lateral meniscal tear and patellofemoral changes. Dr. Jones testified it is more probable claimant had a tear in his knee and the injury made the tear worse. He opined the lateral joint line was preexistent and the patellofemoral joint was very likely directly related to claimant's injury.

Dr. Jones acknowledged claimant had suffered a change in his anatomy as the result of the accident. The surgeries, including the knee replacement are, in his opinion, reasonably necessary to cure and relieve the effects of claimant's injury. Dr. Jones agreed, assuming claimant was pain free before the accident, but for the tire striking claimant's knee, he would not require the total knee replacement. The doctor acknowledged claimant would eventually need the knee replacement. However, the time frame would be total speculation. At this point, claimant has no other reasonable treatment available to him.

Dr. Jones was asked whether either the accident or the preexisting condition was the more predominate cause and he agreed that, between the two, it would probably be a 50-50 split. But, the accident either aggravated or accelerated the need for the knee replacement.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B) states:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
. . .
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g)(h) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510h(a) states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the

> director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

It is undisputed claimant suffered a significant accident with resulting injuries on November 28, 2011. The full extent of those injuries and the medical treatment needed to cure and relieve claimant from the effects of those injuries remains hotly contested. Unfortunately, the opinions of Dr. Jones do little to answer the questions. Claimant underwent surgery shortly after the accident to repair the damage. Claimant was left with significant pain in his knee which was not present prior to the accident. Claimant had suffered what appeared to be a minor accident with the knee some 20 years before for which he received physical therapy. He was returned to work without limitation and worked until the accident with no symptoms in the knee.

Prior to May 15, 2011, claimant's accident and all resulting damage would have been immediately compensable. However, the Workers Compensation Act (Act) was significantly modified at that time. The new law requires the accident be the prevailing factor causing the injury, medical condition and resulting disability or impairment. The mere aggravation, acceleration or exacerbation of a preexisting condition no longer guarantees compensability or medical treatment. The prevailing factor is statutorily defined as the "primary factor." However, Dr. Jones does not find the accident to be the primary factor. He finds it to be equally balanced against claimant's preexisting degenerative conditions in the knee. A 50-50 split does not satisfy the word "primary." It is merely equal. Based upon the opinion of Dr. Jones, claimant would not satisfy the requirements of the Act justifying the award of a total knee replacement.

However, Dr. Jones' opinion is not the only opinion in this record. Dr. Prostic also provided a medical opinion on causation and the need for the total knee replacement. This Board Member finds the opinion of Dr. Prostic alters the balance in this matter in claimant's favor. The Order awarding claimant medical treatment with Dr. Jones, including the knee replacement is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[1] K.S.A. 2013 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has satisfied his burden of proving the primary factor leading to his need for the total knee replacement is the work-related accident and resulting injuries suffered on November 28, 2011.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated May 22, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge